
To: Hansen Beverage Company (efiling@kmob.com)
Subject: TRADEMARK APPLICATION NO. 78529821 - JOKER MAD ENERGY - HANBEV.062T
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/529821

APPLICANT: Hansen Beverage Company

CORRESPONDENT ADDRESS:
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**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**

MARK: JOKER MAD ENERGY

CORRESPONDENT'S REFERENCE/DOCKET NO: HANBEV.062T

CORRESPONDENT EMAIL ADDRESS:
efiling@kmob.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

Applicant has appealed the Trademark Examining Attorney's Final Refusal to register the trademark **JOKER MAD ENERGY** for "beverages, namely, carbonated and non-carbonated energy drinks, excluding fruit drinks and fruit juices" on the grounds that the mark, under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) is likely to be confused with U.S. Registration Nos. 1,248,571, 1,554,967, and 2,521,457. ^[1]

I. FACTS

Applicant, Hansen Beverage Company, applied for registration on the Principal Register for the trademark JOKER MAD ENERGY for "Beverages" in International Class 32. Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of the likelihood of confusion with U.S. Registration No. 1,248,571, 1,554,967, and 2,521,457 for the mark JOKER for "fruit juices"; "fruit drinks and fruit juices"; and "beers, mineral and aerated waters, and soft drinks; fruit drinks and fruit juices, nectar, juices with pulp, fruit concentrate, fruit juices based on concentrate and powders for making beverages, and alcoholic beverages, namely, wines, hard cider, liqueurs, cordials, brandies, cognac, scotch whiskey, rum, gin and vodka," respectively. The Trademark Examining Attorney also required an amendment to the identification of goods and a disclaimer of the word "ENERGY."

Applicant amended the identification of goods to "beverages, namely, carbonated and non-carbonated energy drinks, excluding fruit drinks and fruit juices" and disclaimed the word "ENERGY" apart from the mark. This appeal now follows the Trademark Examining Attorney's denial of the Request for Reconsideration of Applicant's request to withdraw the Section 2(d) refusal to register.

II. ARGUMENT

THE MARKS OF THE PARTIES ARE CONFUSINGLY SIMILAR AND THE GOODS OF THE PARTIES ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

A. THE MARKS ARE CONFUSINGLY SIMILAR

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); TMEP §1207.01(b).

While, the examining attorney must look at the marks in their entireties under Section 2(d), one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 224 USPQ 749 (Fed. Cir. 1985). Additionally, when an Applicant's mark is

compared to a registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 40, 108 USPQ 161 (D.C. Cir. 1956) (internal citation omitted).

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); TMEP §§1207.01(d)(i).

Here, the marks JOKER and JOKER MAD ENERGY are strikingly similar in several critical aspects. First, the marks share an identical term: JOKER. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both Applicant's and Registrant's marks. See e.g., *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd* 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); TMEP §§1207.01(b)(ii) and (b)(iii).

Second, while marks should be viewed in their entireties, some elements are considered more dominant than others. In fact, when a mark is composed of a design and a word, it is the literal element that is considered to be most dominant. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); TMEP §1207.01(c)(ii). Thus, with respect to Registrant's marks, in U.S. Registration Nos. 1,248,571 and 2,521,457, JOKER is the only element in the two marks. Although the U.S. Registration No. 1,554,967 mark includes a design element, JOKER is the only literal element in that mark and is therefore the dominant element there as well. As a result, JOKER is the dominant feature in Registrant's marks.

With respect to Applicant's mark, JOKER is also the initial word and as a general rule, consumers are more inclined to focus on the first word, prefix or syllable in any trademark or service mark. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Because JOKER is the first word in Applicant's mark and the only word in Registrant's marks, the additional wording in Applicant's mark is unlikely to be a feature that consumers would use to distinguish the respective marks.

The only difference in the wording of the marks is the MAD ENERGY component in Applicant's mark. Applicant has simply taken the entire wording of the registered marks and added

MAD ENERGY. The courts have found, however, that the mere addition of a term to a registered mark does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Section 2(d). *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (“GASPAR’S ALE and “JOSE GASPAR GOLD”); TMEP §1207.01(b)(iii).

Furthermore, the addition of the wording MAD ENERGY to the registered marks only minimally distinguishes the marks. In this case, the mere addition of the wording MAD ENERGY, which includes the highly descriptive word ENERGY that has been disclaimed, does not create a commercial impression distinct enough to overcome the likelihood of confusion under Trademark Act Section 2(d). As Applicant argues, Applicant’s mark suggests, “Applicant’s JOKER beverage is wild and crazy (“mad”) with energy.” (See Applicant’s Brief at p. 5). This statement supports the examining attorney’s argument that the dominant feature of applicant’s mark is JOKER and that MAD ENERGY merely modifies the initial word. The result is that the principal, eye-catching word with the greatest commercial impression in all of the marks is still the word JOKER.

Applicant is correct in stating, “disclaimed matter does not disappear from the mark as a whole” and should not be disregarded. Applicant’s Brief at p. 5. Nonetheless, disclaimed matter is typically less significant or less dominant when comparing marks. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entirety, one feature of a mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). The word ENERGY is generic for energy drinks and clearly is not a dominant feature of Applicant’s mark. The word MAD merely emphasizes the kind of energy Applicant’s goods and/or Applicant’s JOKER purportedly possess. Thus, the word JOKER creates the greatest commercial impression and is the dominant feature of Applicant’s mark as well as the marks identified in the cited registrations.

Applicant also argues that the appearances of the marks are not identical. Ultimately, regarding the issue of likelihood of confusion, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods/services they identify come from the same source. (Emphasis added). *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be

distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 54 USPQ2d 1894, 1890 (Fed. Cir. 2000). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); TMEP §1207.01(b). Thus, a consumer encountering the mark JOKER MAD ENERGY on Applicant's goods might incorrectly believe that the goods originate from the same source as Registrant's JOKER goods. Applicant also states that the added terms MAD ENERGY create the meaning that the mark is "JOKER with MAD ENERGY". See Applicant's Brief at p. 5. However, because the key word is JOKER, a consumer may incorrectly assume that the JOKER MAD ENERGY drinks originate from the same source as Registrant's JOKER drinks but are just a variation of them because they are drinks with "MAD ENERGY." As such, the marks create the same overall commercial impression and thus are confusingly similar.

Lastly, if the goods or services of the respective parties are closely related, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods or services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied 506 U.S. 1034 (1992); TMEP §1207.01(b). As discussed below, the various beverages of the parties are closely related. Thus the similarity of the marks required to support the refusal under Trademark Act Section 2(d) is not as great as would apply with diverse goods. In fact, the commercial impressions of JOKER and JOKER MAD ENERGY are more than sufficiently similar under Trademark Act Section 2(d) to warrant the refusal.

B. THE GOODS ARE CLOSELY RELATED

Applicant's goods are "Beverages, namely, carbonated and non-carbonated energy drinks, excluding fruit drinks and fruit juices." Registrant's goods are

In U.S. Registration No. 2521457 - "beers, mineral and aerated waters, and soft drinks; fruit drinks and fruit juices, nectar, juices with pulp, fruit concentrate, fruit juices based on concentrate and powders for making beverages" and "alcoholic beverages, namely, wines, hard cider, liqueurs, cordials, brandies, cognac, scotch whiskey, rum, gin and vodka";

In U.S. Registration No. 1554967 - "Fruit drinks and fruit juice"; and

In U.S. Registration No. 1248571 - "Fruit juices."

Although Applicant amended its recitation of goods to exclude “fruit drinks and fruit juices” from its beverages, the amended recitation of goods does not place Applicant’s goods completely outside of the field of Registrant’s goods or make the parties’ goods unrelated. Notably, Applicant did not exclude “soft drinks” from its amended recitation of goods and presumably applicant’s “carbonated energy drinks” could be identical to Registrant’s broadly-worded “soft drinks” which are merely carbonated, nonalcoholic drinks^[2]. Nor did Applicant limit the consumer base to distinguish it from what Applicant argues is Registrant’s. As a result, the examining attorney still found that Applicant’s beverages were highly related to Registrant’s beverages.

As the examining attorney previously stated, the parties’ goods in this case are related because they include beverages that would be found in the same channels of trade and sold in the same stores, i.e., grocery stores in the beverages aisles or display cases. For example, it is not unlikely that Applicant’s carbonated energy drinks would be sold in the same aisle or case as Registrant’s soft drinks or fruit drinks. The goods of the parties need only be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and/or services come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Attached as evidence in the examining attorney’s Office Actions were copies of more than ten (10) printouts from the USPTO X-Search database, which showed third-party registrations of marks used in connection with the same or similar goods as those of Applicant and Registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely energy drinks (as offered by Applicant) and soft drinks and/or fruit drinks (as offered by Registrant) are of a kind that may emanate from a single source. *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218 (TTAB 2001), citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant boldly states, “[c]onsumers do not presume that the sources of energy drinks and healthful fruit juice beverages would be the same.” Applicant’s Brief at p. 10. Applicant also posits

“Applicant’s energy drinks are sold primarily in convenience stores and gas stations. Although you will find energy drinks in the soda aisles of grocery stores, that is not where most 18-30 year old males shop.” Applicant’s Brief at p. 9.

As an initial matter, Applicant appears to ignore the recitation of goods in U.S. Registration No. 2,521,457, which includes soft drinks. Soft drinks, as the attached definitions indicate, encompass Applicant’s carbonated energy drinks and thus could be identical. Moreover, Applicant admits that its energy drinks can be found in the soda aisles and thus admits the parties’ goods, energy drinks and soft drinks, travel in the same channels of trade and are sold together. With respect to the fruit juices being sold in refrigerated sections of grocery stores and whether or not most 18-30 year old males shop in those sections of the store, the record does not contain any evidence to support Applicant’s assertion.

Furthermore, contrary to Applicant’s statements, each of the prior registrations attached to the Office Actions support the argument that the beverages offered by Applicant and Registrant are of a kind that may emanate from a single source under the same trademark. For example, soft drinks and energy drinks are both offered under the trademark MMMM. ENERGY in U.S. Registration No. 2805,734; soft drinks, namely, non-carbonated fruit juice drinks and energy drinks are goods registered under the trademark OL’ GLORY in U.S. Registration No. 2,855,717; fruit juice drinks, carbonated and non-carbonated soft drinks and energy drinks are goods registered under the trademark U S ENERGY DRINK in U.S. Registration No. 2,689,568; the identical goods are registered under the trademark SYNERGY in U.S. Registration No. 3,032,757; fruit flavored drinks, juice-based drinks, and energy drinks are goods registered under the trademark ASCENDIA in U.S. Registration No. 3016085; noni fruit juice and energy drinks are goods registered under the mark DEL MAXIMO in U.S. Registration No. 3023088; energy drinks, fruit drinks, fruit juices, and soft drinks are goods registered under the HARVEST PAK trademark in U.S. Registration No. 3056503; fruit juice drinks, carbonated and non-carbonated soft drinks, and energy drinks are goods registered under the DIESEL ENERGY DRINK trademark in U.S. Registration No. 3016343. These and other registrations were attached to the examining attorney’s Office Actions and incorporated by reference herein. The evidence on the record indicates that a single source offers all of these types of beverages; thus, consumers have reason to presume that the source of energy drinks and fruit juice and soft drinks originate from the same source.

In fact, it appears that Applicant, Hansen Beverage Company, itself sells energy drinks, juices, and sodas in the marketplace. See examining attorney's attachment on p. 7 of the July 19, 2005 Office Action.

It is unclear why Applicant states that Registrant's goods are targeted to different consumers and through different marketing channels when such limitation to the goods is not apparent in the registrations or the application and no actual evidence is submitted to support Applicant's claim. The examining attorney nonetheless disagrees that the parties' consumers are different.

First, there is no evidence of record that Registrant made such a limitation with respect to its consumers in its registration; in other words, the recitation of Registrant's goods are not "fruit juices solely for 25-40 year old women and children" or "soft drinks sold exclusively to health food enthusiasts excluding 18-30 year old males." Nor does Applicant's recitation of goods include any limitation with respect to its target consumers or with respect to its channels of trade; in other words, Applicant's recitation does not state, "energy drinks sold exclusively through convenience stores and gas stations and not in the refrigerated section of groceries."

Neither Registrant's nor Applicant's recitation of goods as set forth in the registration and application are limited by any language suggesting that the goods will only be offered to a certain class of consumer. In this regard, it is irrelevant that Applicant's intended target purchasers are different from Registrant's purchasers. Applicant has improperly attempted to limit Registrant's clientele. It is well settled that a determination of whether there is a likelihood of confusion is made solely on the basis of the services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). If the cited registrations describe the goods broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); TMEP §1207.01(a)(iii).

Even if Applicant has shown that Registrant's customers are of a certain gender and age demographic, Applicant's application does not exclude this client base. It is not a matter of record that Applicant's goods would not be targeted to the identical consumers targeted by Registrant. Clearly, both

parties' consumers seek beverages and it is at least questionable that Applicant would seek to exclude Registrant's alleged consumer base.

Second, any goods or services in Registrant's normal fields of expansion must also be considered in order to determine whether Registrant's goods are related to Applicant's identified goods for purposes of analysis under Section 2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). Applicant claims, but provides no evidence, that Registrant's static use of its JOKER mark precludes energy drinks as being within its zone of expansion. Applicant states, "To Applicant's knowledge, Registrant has only ever used its mark on fruit juices. Even assuming Registrant also sells beers and waters, Registrant has not expanded its use." Applicant's Brief at p. 10. Nonetheless, the test is not whether Registrant already sells those goods in the marketplace under its trademark. Rather, the test is whether purchasers would believe the product or service is within Registrant's logical zone of expansion. *CPG Prods. Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983); TMEP §1207.01(a)(v). Additionally, the presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that Registrant is the owner of the mark and that use of the mark extends to all goods identified in the registration. The presumption also implies that Registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991). Registrant has already registered its mark JOKER for soft drinks and thus purchasers would believe that energy drinks is within Registrant's logical zone of expansion.

Applicant's thinly-veiled suggestion that the registration owner of the cited marks has abandoned its trademark for all goods other than fruit juices (see Applicant's Brief at p. 10) is information relevant to a formal cancellation proceeding and is not appropriate matter for *ex parte* examination. TMEP §1207.01(d)(iv). Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. During *ex parte* prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration such as a registrant's nonuse of the mark. See *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

As evidenced by the above-referenced X-Search printouts, a single source quite commonly offers fruit juices, soft drinks, and energy drinks. Potential customers exposed to both Registrant's mark and Applicant's mark on beverages will naturally assume that both stem from the same source, namely Registrant. Applicant's statement that "A purveyor of healthy products would not use the same mark to sell an energy drink" (Applicant's Brief at p. 10.) is contradicted by the evidence attached to the Office Actions which demonstrate that in fact purveyors of "healthy products" such as fruit juices and fruit drinks use the same marks to sell energy drinks. Again, Applicant, Hansen Beverage Company, itself sells energy drinks, juices, and sodas. See examining attorney's attachment on p. 7 of the July 19, 2005 Office Action. Thus, the goods are certainly related and the same potential customers encountering the similar marks will likely be confused as to the source of the goods.

In this instance, no evidence has been submitted that establishes that Applicant's goods and Registrant's goods are dissimilar or that they travel in different channels of trade. In fact, as discussed above, the evidence submitted previously by the examining attorney indicates that these goods are so related that they are often offered by the same source. In short, the evidence in the record clearly shows that the various beverages offered by the parties are sufficiently related under Section 2(d) of the Trademark Act, such that purchasers would confuse the source of those services, especially in view of the great similarity of the marks themselves.

III. CONCLUSION

The marks are very similar and the goods are closely related. Consumers encountering Applicant's mark and the cited registered mark in the marketplace are therefore likely to mistakenly believe that the goods emanate from a common source. For the foregoing reasons, the refusal to register under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,

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Thomas G. Howell
Managing Attorney


Law Office - 105

[1] The registrant, Joker S.A. Corporation, owns all three of the cited Registrations.

[2] The examining attorney respectfully requests that the Board take judicial notice of the dictionary definitions attached herein. *In re Deutsche Airbus*, 224 USPQ 611 (1994 TTAB).

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Dictionary **Thesaurus** **Translations**

ABCDEFGHIJKLMNOPQRSTUVWXYZ

↑

soft drink

soft-boiled

soft budget constraint

soft chance

soft coal

soft-coated wheaten terrier

soft commodities

soft copy

soft-core

▶ **soft drink**

soft drug

soft focus

soft fruit

soft furnishings

soft gamma repeater

soft goods

soft hail

soft-hearted

↓

soft drink (plural soft drinks)

noun

Definition:

cold nonalcoholic drink: a nonalcoholic and usually carbonated beverage, usually served chilled

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K-5 Parents
Homework Help
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Test Prep

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Merriam-Webster's Online Dictionary

soft drink

One entry found for **soft drink**.

Main Entry: **soft drink**
Function: *noun*
: a usually carbonated nonalcoholic beverage; *especially* : **SODA POP**

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The American Heritage® Dictionary of the English Language: Fourth Edition. 2000.

soft drink

NOUN: also called regionally *Regional cold drink*, *Regional drink*, *Regional pop*¹, *Regional soda*, *Regional soda water*, *Regional tonic*. 1. A nonalcoholic, flavored, carbonated beverage, usually commercially prepared and sold in bottles or cans. 2. A serving of this beverage. See *Regional Note* at *tonic*. In both senses also called *soda pop*.

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